U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 December 2004

In the Matter of:

MILTON MONTOYA,
Claimant,

v. Case No.: 2004-BLA-05671

PITTSBURGH & MIDWAY COAL CO.,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

APPEARANCES: Sisto J. Mazza, Esq.
For the Claimant

William C. Erwin, Esq.
For the Employer

BEFORE: Thomas M. Burke
Associate Chief Administrative Law Judge

DECISION AND ORDER AWARDING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. § 901 *et seq.* ("Act"), and the implementing regulations thereunder at 20 C.F.R. Parts 718 and 725 (2001). A hearing was held on July 22, 2004 in Raton, New Mexico. The decision in this matter is based upon the testimony of Claimant at the hearing,[1] all documentary evidence admitted into the record at the hearing, and arguments made by the parties during the hearing. The documentary evidence admitted at the hearing includes *Director's Exhibits (Dx.) 1-33*, *Claimant's Exhibits (Cx.) 1-4*, and *Employer's Exhibits (Ex.) 1-2*.

[1] References to the hearing transcript are denoted Tr. at page number.

Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Factual and Procedural History

Claimant worked in the Nation's coal mines for 40 years. *Dx. 31.* Claimant began working in the coal mines in 1953 and retired in 1991. *Dx. 4.* Claimant held various jobs throughout his career including hand loading, pick and shovel; foreman; fire boss; and cornerman. *Tr. at 12-18.* All of these jobs required Claimant to work in underground mines. *Dx. 4.* As a handloader, Claimant dug coal and loaded it by hand for removal. As a foreman, Claimant walked approximately 5 to 6 miles a day, shoveled coal, hauled 50 pound bags of rock dust, and rock dusted. *Dx. 5 and Tr. at 18.* As a fire boss, Claimant was in charge of the ventilation around the continuous miner at the immediate face. He made sure "that the fresh air went over the continuous miner operator and …cleaned ribs." *Tr. at 15.* As a cornerman, Claimant testified that he

> was at the corner of the long wall section at the tail gate side. The air comes up the face which is 500 feet long and then it returns and goes out of one of the returns, either left or right, whichever is there, but I was in charge of that. I was checking for methane gas, black down or whatever, and I would advance the tail gate, and it was a very dusty environment.

Tr. at 17. Claimant testified that his jobs were physically demanding. *Tr. 13 and 15.* Claimant has no smoking history.

This is Claimant's second claim for benefits. His first claim, filed on April 24, 1991 was initially awarded by Administrative Law Judge Rudolf Jansen on January 23, 1998. *Dx. 1.* The Benefits Review Board remanded the case, and ALJ Jansen subsequently denied benefits on August 24, 1999 because Claimant did not establish that he was totally disabled due to a respiratory disease. The Benefits Review Board upheld ALJ Jansen's denial on September 20, 2000.

The current claim was filed on April 8, 2003. *Dx. 3.* As the current claim was filed more than a year after the effective date of the previous denial, it is a subsequent claim. 20 C.F.R. §725.309(d). A subsequent claim will be denied unless the Claimant meets one of the elements of entitlement that he did not meet in the previous claim. 20 C.F.R. § 725.309(d)(2). The Claimant must establish at least one element of entitlement that was decided against the Claimant in the prior claim with the new evidence submitted in connection with the current, subsequent claim. 20 C.F.R. § 725.309(d)(3). In this claim, Claimant must establish that he is totally disabled from a pulmonary standpoint based on the evidence submitted in this subsequent claim.

Total Disability in the Current, Subsequent Claim

Benefits are provided under the Act for miners that have a pulmonary or respiratory impairment which, standing alone, prevents or prevented them from performing their usual coal mine work and other "gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §718.204(b)(2). Twenty C.F.R. §718.204(b)(2) provides the following methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided heart failure;[2] or (4) reasoned medical opinions.

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. §718.103 and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP,* 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and (3) for claims filed after January 19, 2001, a flow-volume loop must be provided. The administrative law judge may accord less weight to those studies where the miner exhibited poor cooperation or comprehension. *Houchin v. Old Ben Coal Co.,* 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP,* 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 and either the FVC or the MVV values be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height. 20 C.F.R. §718.204(b)(2)(i).

Two pulmonary function test studies were submitted in connection with the current claim. Dr. Klepper conducted the first study on June 20, 2003. *Dx. 13.* Claimant was 69 years old and 65 inches in height at the time of the study. Claimant's FEV1 was 2.63, FVC was 3.33, and MVV was 97. *Dx. 13.* Based on those values, this is not a qualifying pulmonary function test. Dr. Rephser conducted the second study on August 6, 2003. *Dx.* 22. Claimant was 69 years old and measured at 66 inches in height at the time of the test. Claimant's FEV1 was 2.98 and FVC was 3.79. *Dx. 22.* After the administration of two puffs of Proventil given for bronchodilation, Claimant's FEV1 was 3.02 and FVC was 3.52. *Dx. 22.* Based on those values, this pulmonary function test does not reveal qualifying values. Thus, the pulmonary function test evidence does not establish that Claimant is totally disabled.

Total disability may also be established by qualifying blood gas studies. 20 C.F.R. §718.204(b)(2)(ii). In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found on the corresponding table at Appendix C. Two arterial blood gas studies were submitted in connection with the current claim. On June 20, 2003, Dr. Klepper administered the first study at an altitude of over 6,000 feet. *Dx. 11.* At rest, Claimant's PCO2 was 33 with a 56.7 PO2 value. *Dx. 11.* During exercise, Claimant's PCO2 was 32.4 with a 46.1 PO2 value. *Dx. 11.* Both the resting and exercise values are qualifying. Dr. Repsher administered the second study on August 6, 2003 at an elevation of approximately 4,600 feet.

[2] There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

Dx. 22. At rest, Claimant's PCO2 was 36 with a 73 PO2 value. These are not qualifying values. Dr. Repsher did not exercise Claimant; therefore, there are no exercise values. As Claimant's coal mine work was physically demanding, the key question in determining total disability is whether the Claimant is able to perform his usual coal mine work. It is determined that the uncontradicted qualifying exercise values evidence a total disability.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. §718.204(b)(2)(iv). Drs. Klepper and Repsher have authored medical reports addressing Claimant's impairment.

Dr. Klepper examined the Claimant on June 20, 2003. *Dx. 10.* Dr. Klepper noted Claimant became short of breath when climbing hills or steps. *Dx. 10 at 2*. Claimant's exercise hypoxemia would prevent him from performing his last coal mine job in Dr. Klepper's opinion. *Dx. 10 at 4*. Chronic bronchitis caused Claimant's impairment; thus, Dr. Klepper opined that Claimant is totally disabled due to a respiratory impairment.

Dr. Repsher examined the Claimant for the third time on August 6, 2003, and he authored a medical report on August 12, 2003. *Dx. 22.* Dr. Repsher noted that Claimant complained of a further increase in shortness of breath and of dyspnea on exertion while walking on level ground. Dr. Rephser did not find any evidence of a pulmonary impairment, and concluded that Claimant "remains fully fit to do his usual coal mine work or work of similar exertional requirements from a pulmonary standpoint." *Dx. 22 at 4.*

As Claimant's usual coal mine work was physically demanding and the arterial blood gas test results were qualifying at exercise, Claimant has established that he is totally disabled. Dr. Repsher did not observe Claimant during exercise as did Dr. Klepper. Thus, Dr. Repsher's opinion is not as probative in determining if Claimant is able to perform his usual coal mine job or one with similar exertional requirement as is Dr. Klepper's opinion. After considering the pulmonary function test evidence, the arterial blood gas study evidence, and the medical opinion evidence, it is determined that Claimant has established total disability based on the evidence submitted in the current claim.

Having met the threshold burden in this subsequent claim, Claimant now bears the burden of establishing that he is entitled to benefits under the Act.

Additional Standards for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718 (2001). [3] In addition to establishing the threshold requirement in this subsequent claim: total disability due to a respiratory disease based on evidence submitted in the current

[3] As the miner last engaged in coal mine employment in the state of Colorado, appellate jurisdiction of this matter lies with the Tenth Circuit Court of Appeals. *Shupe v. Director, OWCP,* 12 B.L.R. 1-200, 1-202 (1989)(en banc).

claim; Claimant also bears the burden of establishing by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§ 718.202 – 718.204. Evidence which is in equipoise is insufficient to sustain Claimant's burden in this regard. *Director, OWCP v. Greenwhich Collieries,* 114 S.Ct. 2251 (1994), *aff'd sub. nom. Greenwhich Colleries v. Director, OWCP,* 990 F.2d 730 (3rd Cir. 1993). Failure to establish any one of these elements precludes entitlement to benefits.

Existence of Pneumoconiosis and its Etiology

Under the regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
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> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction to the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
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> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R § 718.201. Moreover, the regulations at 20 C.F.R. § 718.203(b) provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or more, as

in this case with 40 years of coal mine employment, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence.[4] 20 C.F.R § 718.202(a).

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more x-ray reports are in conflict, in evaluating such x-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays."[5] In this vein, the Benefits Review Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board- certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.,* 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.,* 6 B.L.R. 1-376 (1983). There are six interpretations of five x-rays in the record.

The May 24, 1991 x-ray was interpreted by Drs. Allen and Simpson, both of whom are B-readers. Dr. Simpson interpreted the film as showing s/s opacities with a profusion of 0/1 in four lung zones. *Dx. 1 (Dx. 14 of claim filed April 24, 1991).* Dr. Allen interpreted the film as completely negative. *Dx. 1 (Dx. 15 of claim filed April 24, 1991).* Thus, the May 24, 1991 x-ray film does not support a finding of pneumoconiosis.

The July 9, 1992 x-ray was interpreted by Dr. Repsher, a B-reader, as having no parenchymal abnormalities consistent with pneumoconiosis. *Dx. 1 (Dx. 24 of claim filed April 24, 1991).* This study does not support a finding of pneumoconiosis.

The June 12, 1997 x-ray was also interpreted by Dr. Repsher. Dr. Repsher found the film to be completely negative. *Dx. 1 (Ex. 3 of claim filed April 24, 1991).* This film also does not support a finding of pneumoconiosis.

The June 20, 2003 x-ray was interpreted by Dr. Klepper, who is not a B-reader. Dr. Klepper interpreted the film as showing s/s opacities in the right lung, but did not indicate the profusion level of these opacities. *Dx. 14.* As the profusion level is unknown, the June 20, 2003 x-ray does not support a finding of pneumoconiosis.

The August 6, 2003 x-ray was interpreted by Dr. Repsher. Dr. Repsher found no parenchymal abnormalities consistent with pneumoconiosis. *Dx. 22.* This study does not support a finding of pneumoconiosis.

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[4] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 – 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

[5] A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH).

The x-ray evidence as a whole does not establish the existence of pneumoconiosis.

The other method by which Claimant may establish the existence of pneumoconiosis is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patients' history. *See Hoffman v. B&G Construction Co.,* 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.,* 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra.* Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.,* 12 B.L.R. 1-149 (1989)(en banc). Moreover, legal pneumoconiosis is established by well-reasoned medical reports which support a finding that the miner's pulmonary or respiratory condition is significantly related to or substantially aggravated by coal dust exposure. *Wilburn v. Director, OWCP,* 11 B.L.R. 1-135 (1988). The following medical reports were admitted as evidence in the record:

1. Dr. Klepper examined Claimant on May 24, 1991. *Dx. 1 (Dx. 12 of claim filed April 24, 1991).* Claimant complained of shortness of breath at exertion, particularly when climbing hills. Dr. Klepper diagnosed mild obstructive airways disease with hypoxemia at rest and desaturation with exercise. The cause of this disease was "most likely related to mining exposure since patient is a nonsmoker."

2. In response to a letter dated October 1, 1991 from a Claims Examiner, Dr. Klepper wrote a letter on October 9, 1991 in which she explained that based on the regulatory definition of pneumoconiosis, Claimant's symptoms, mining history, non-smoking status, and abnormal blood gases with exercise desaturation, her opinion was that Claimant's pulmonary impairment is primarily related to coal mine dust exposure.

3. Dr. Repsher examined the Claimant on July 9, 1992, and authored a report on July 13, 1992. *Dx. 1 (Dx. 24 of claim filed April 24, 1991).* Claimant complained of slowly progressive dyspnea on exertion. Upon exercise, Dr. Repsher noted no respiratory limitation to Claimant's exercise capacity and mild exertional hypoxemia of no clinical significance. Dr. Repsher attributed the mild exertional hypoxemia and left basilar atelectasis, collapse of the lung, to Claimant's obesity. Dr. Repsher opined that Claimant does not suffer from pneumoconiosis or any other respiratory disease caused by or aggravated by his 40 years of coal mine employment. Dr. Repsher based his opinion on the chest x-ray and pulmonary function tests.

4. Dr. Repsher was deposed on December 12, 1992. *Dx. 1 (Ex.1 of claim filed April 24, 1991).* Dr. Repsher's testimony mirrored this medical report: in his opinion, there is no evidence of pneumoconiosis. Claimant's partial lung collapse due to his obesity caused his exercise desaturation.

5. Dr. James authored a medical opinion on July 8, 1996. *Dx. 1 (Cx. 1 of claim filed April 24, 1991).* Dr. James examined Claimant on three occasions: September 2, 1994; February 2, 1996; and April 12, 1996. Dr. James reviewed the opinions of Drs. Klepper and Repsher as well as other medical records. In Dr. James's opinion, "there more likely than not is evidence that Mr. Montoya has pneumoconiosis." Dr. James noted that Claimant's 40 years of coal mine employment is his only significant risk factor. Dr. James offered the opinion that Claimant's x-ray readings of irregular shaped s/s parenchymal abnormalities are not typical of the usual radiographic appearance of the scarring changes in coal workers' pneumoconiosis, but that studies that have noted an increased appearance of such irregular shaped opacities on the x-rays of coal miners in general.

6. Dr. Repsher examined Claimant on June 12, 1997, and authored a medical report on June 16, 1997. *Dx. 1 (Ex. 3 of claim filed April 24, 1991).* Dr. Repsher responded to Dr. James's report and stated that the articles cited by Dr. James do not support Dr. James's conclusions. As in his previous reports, Dr. Repsher found no radiographic evidence and no pulmonary function study evidence of pneumoconiosis.

7. Dr. Klepper examined Claimant and authored a medical report on June 20, 2003. *Dx. 10.* She noted Claimant has occasional wheezing with exercise and is short of breath when climbing hills or steps. Dr. Klepper diagnosed chronic bronchitis with hypoxemia at rest and significant desaturation with exercise. Claimant's condition, in Dr. Klepper's opinion, is most likely related to his mining exposure since he is a non-smoker and has no other history of pulmonary vascular disease.

8. Dr. Repsher examined Claimant on August 6, 2003, and authored a medical report on August 12, 2003. *Dx. 22.* At the time of the examination, Claimant complained of a further increase in shortness of breath and dyspnea on exertion even while walking on ground level. Dr. Repsher noted the pulmonary function tests and arterial blood gas studies were normal. Dr. Repsher diagnosed left ventricular congestive heart failure based on Claimant's chest x-ray and attributed Claimant's hypoxemia to this heart failure. Dr. Repsher did not find any evidence of pneumoconiosis.

9. In response to Dr. Respher's August 12, 2003 report, Claimant consulted with several cardiologists. On September 24, 2003, Dr. Alan King examined Claimant and reviewed the August 6, 2003 echocardiogram report; the June 20, 2003 standard EKG treadmill stress test; and the August 6, 2003 EKG. *Cx. 1.* Dr. King, a cardiologist, found no clues to heart disease that would explain the Claimant's dyspnea. *Cx. 1.* On October 6, 2003, Claimant underwent a cardiolite treadmill examination. Dr. Frank Mowry, a cardiologist, opined that the study showed no evidence suggesting exercise induced myocardial ischemia either by reason of symptoms, electrocardiogram or nuclide perfusion. *Cx. 2.* On March 8, 2004, Dr. Williams, Claimant's primary care physician, wrote a letter repeating the opinions of Drs. King and Mowry: Claimant's shortness of breath is due to his lung disease that resulted from his 40 years of coal mine employment.

10. Dr. Repsher was deposed on March 1, 2004. *Ex. 1.* His testimony reiterates his previous opinions expressed in his medical reports: Claimant does not suffer from pneumoconiosis.

Based on the medical opinion evidence in the record, Claimant has established the presence of pneumoconiosis. Dr. Repsher did not find evidence of pneumoconiosis, but Dr. Klepper did. Both doctors have evaluated Claimant several times over more than ten years. Dr. Klepper's diagnosis of pneumoconiosis is supported by the Claimant's symptoms, work history, and the opinion of Dr. James. Dr. Repsher first attributed Claimant's shortness of breath and dyspnea to a partially collapsed lung. *Dx. 1. (Dx. 24 and Ex. 1 of claim filed April 24, 1991).* No other doctor noted a partially collapsed lung. Then Dr. Repsher concluded Claimant had heart failure, which caused his shortness of breath and dyspnea. Claimant consulted two cardiologists; neither of which found any evidence of heart failure. Cardiologists are in a better position than Dr. Rephser, a pulmonologist, to determine if Claimant suffers from heart failure. Thus, Dr. Repsher's opinions are not supported by the evidence and are given little weight. All doctors noted Claimant's complaints of shortness of breath and dyspnea; his 40 years of coal mine employment; his non-smoking history; and his lack of other risk factors for lung disease. Thus, the medical opinion evidence establishes the presence of pneumoconiosis.

While the x-ray evidence does not establish the existence of pneumoconiosis, it is not in conflict with the medical opinion evidence that does establish the presence of pneumoconiosis. The medical opinion evidence establishes the presence of legal pneumoconiosis, while the x-ray evidence is limited to a finding of no clinical pneumoconiosis. A finding of no clinical pneumoconiosis is not equivalent to a finding of no pneumoconiosis. Additionally, a finding of pneumoconiosis is proper despite the absence of radiographic evidence of pneumoconiosis. 20 C.F.R §718.202(a)(4) and (b). Considered as a whole, the evidence of record supports a finding that Claimant suffers from pneumoconiosis.

Because Claimant worked for forty years in the coal mines, there is a rebuttable presumption that Claimant's pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.201. There is no evidence in the record that rebuts this presumption. Thus, Claimant's pneumoconiosis arose out of his coal mine employment.

Total Disability Due to Pneumoconiosis

As a threshold determination in this claim, Claimant established that he is totally disabled from a pulmonary impairment. Considering the evidence submitted in this subsequent claim together with the evidence submitted in the prior claim, Claimant has established that he is totally disabled.

As with the evidence in this subsequent claim, the pulmonary function study evidence does not establish total disability. Claimant underwent these tests on May 24, 1991 *Dx. 1 (Dx. 8 of claim filed April 24, 1991)*; July 13, 1992 *Dx. 1 (Dx. 24 of claim filed April 24, 1991)*; and June 16, 1997 *Dx. 1 (Ex.3 of claim filed April 24, 1991)*. None of these studies revealed qualifying values. Claimant also underwent arterial blood gas tests on the same dates. *Dx.1 (Dx. 10, Dx. 24, and Ex. 3, respectively of claim filed April 24, 1991)*. The values revealed on each of

the studies at rest are not qualifying. The values upon exercise, however, are qualifying. *Dx. 1 (Dx. 10 of claim filed April 24, 1991).* Because a Claimant is considered to be totally disabled if he is unable to return to his usual coal mine job or one with similar exertional requirements, the qualifying arterial blood gas study at exercise is given controlling weight. Claimant's coal mine employment required him to do heavy labor and the qualifying arterial blood gas values upon exercise demonstrate that Claimant is unable to return to his usual coal mine job.

Three doctors authored medical reports, none of which opined that Claimant was totally disabled. Dr. Klepper did not quantify the degree of impairment she noted upon her examination of Claimant. *Dx. 1 (Dx. 12 of claim filed April 24, 1991).* Dr. Klepper merely stated that "patient didn't note respiratory limitations while working as a miner." *Id.* As pneumoconiosis is a latent and progressive disease, the fact that Claimant did not note respiratory limitations while working as a miner does not preclude a finding that Claimant is totally disabled due to pneumoconiosis now. Furthermore, Claimant testified that in 1986 his breathing came to the point where he could not keep up with the work. *Tr. at 19.* Thus, Dr. Klepper's statement is given little weight because it is not reflective of the Claimant's current condition and is contrary to Claimant's testimony.

Dr. Repsher opined that Claimant is not totally disabled. *Dx. 1 (Dx. 24, Ex. 1, and Ex. 3of claim filed April 24, 1991).* Dr. Repsher maintains that Claimant has normal exercise capacity. This opinion, however, is not supported by the evidence of record. When measured at exercise, Claimant's arterial blood gas studies reveal qualifying values. As Dr. Repsher's opinion is not supported by the evidence, it is given little weight.

Dr. James's opinion that Claimant is able to perform his usual coal mine work is based on the spirometry values obtained by Dr. Klepper in 1991. *Dx. 1 (Cx. 1 of claim filed April 24, 1991).* Dr. James did not discuss the qualifying blood gas study values obtained by Dr. Klepper during the same examination. While it is true that Claimant's spirometry values do not support a finding that Claimant is totally disabled, Claimant's blood gas values upon exercise do support such a finding. Thus, Dr. James's opinion merely restates the pulmonary function test evidence, and it is not reasoned because it fails to address the contrary arterial blood gas study evidence.

The evidence submitted in the prior claim considered with the evidence submitted in the current, subsequent claim establishes that Claimant is totally disabled due to a pulmonary impairment. As Claimant's coal mine employment required him to do physically demanding activities, the qualifying arterial blood gas values on exercise demonstrate that Claimant is unable to perform his usual coal mine work or a job with similar exertional requirements.

Claimant has established that he is totally disabled due to a pulmonary impairment. That pulmonary impairment is legal pneumoconiosis. Dr. Klepper and Dr. James both opined that Claimant suffered from a coal mine dust induced pulmonary impairment. Their opinions are supported by the medical evidence and Claimant's work history and symptoms. Claimant's respiratory impairment arose out of coal mine employment and as such is pneumoconiosis. This respiratory impairment causes him to be totally disabled. Therefore, Claimant is totally disabled due to pneumoconiosis.

Onset of Benefits

Claimant is entitled to benefits commencing on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis, or if such a date cannot be determined from the record, the month in which the miner filed his claim, April 2003 in this case. 20 C.F.R § 725.503; *Carney v. Director, OWCP,* 11 B.L.R. 1-32 (1987); *Owens v. Jewel Smokeless Coal Corp.,* 14 B.L.R. 1-47 (1990). Moreover, the date of the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP,* 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.,* 6 B.L.R. 1-1306, 1-1310 (1984). Upon review of the record in this case, it is determined that the onset date cannot be determined from the medical evidence and, therefore, benefits are payable from April 2003, the month in which the miner's claim was filed. Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by Milton Montoya is granted and the payment of benefits shall commence as of April 2003.

IT IS FURTHER ORDERED that, within 30 days of the date of issuance of the *Decision*, Claimant's counsel shall file, with this Office and with opposing counsel, a petition for a representatives' fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366. Counsel for the Director and for Employer shall file any objections with this Office and with Claimant's counsel within 20 days of receipt of the petition for fees and costs. It is requested that the petition for services and costs clearly state (1) counsel's hourly rate and supporting argument or documentation thereof, (2) a clear itemization of the complexity and type of services rendered, and (3) that the petition contains a request for payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions for work performed before the district director or appellate tribunals. *Ilkewicz v. Director, OWCP,* 4 B.L.R. 1-400 (1982).

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Thomas M. Burke
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue,